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Otis, Harrison Gray.

MR. OTIS'S SPEECH

In Congress, on the SEDITION LAW, *with Remarks by the "* EXAMINER" *on this important subject.*

MR. OTIS

OBSERVED, that nothing could have been more unexpected by him, than a debate upon the present occasion, until the honorable gentleman from Kentucky, had given notice of his dissent from the report of the committee, and so convinced was he that any commentaries from him upon a subject so long since exhausted would be entirely unprofitable, that he should have rested satisfied without interfering in the discussion, had not the remarks of the last hon. gentleman, (Mr. Barbour) rendered it incumbent upon him to detain the Senate by a few observations. He trusted to their patience in hearing him, from a consideration of his peculiar situation. I am sir, said he, (though not yet passed the purlieus of old age) the only individual now in either house of Congress who voted in favor of the sedition act. One honorable, and by me always respected member of this house, (Mr. Macon) and two or three others in the House of Representatives, are the only remnants, at present in Congress, of both political parties, who at that period of anxiety and agitation of the public mind were daily summoned to stem with hearts of controversy conflicting opinions, and divide upon all questions. I pause not to moralize upon this fact—to calculate how many have gone to render an account of their motives and conduct to a higher tribunal, nor to consider the destines and vicissitudes which may have befallen those who remain. Many of them are yet living, and while they cannot wish or expect that I should promote discussions, which bring to mind the unpleasant recollections of past times, yet when the occasion arises and subjects are presented which render allusions to them unavoidable, they ought to expect I will shew to the world, that I am not ashamed of my old associates, and that I find no reason to blush for the part which I sustained in support of their measures. Let it not, sir, be inferred, from this suggestion, that I am at this time and under present circumstances, an advocate

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for the sedition act, or that I would favor its revival. On the contrary, upon a proposition to renew it, the honorable gentleman from Kentucky would find me on his side, and influenced, though not to their extent, by some of his reasons. Twenty years have elapsed since the passage of that act. While on a review of my humble agency in political affairs during that period, I find no cause for repentance, and but little for a change of speculative opinions; yet am I free to avow, that this is a measure which I would not repeat, and for the simple reason, that it would do violence to a well ascertained and settled public opinion, adverse to the necessity and expediency of such a law. To persevere in measures which, by experience, are found to be prolific only of public discontent and general agitation, would be not less reprehensible, than to shrink from an experiment in the first instance, which is dictated by judgment and conscience, through a timid calculation of popular effect. I do not indulge a self-complacency, which in the retrospect of twenty years, perceives no practical errors in which it would not persist. It is the part of an independent mind, in all questions of the first impression, to search for truth, to decide agreeably to its own convictions and endeavor to impart to public opinion, the direction which it thinks to be correct. Failing in this, a representative has discharged his duty to his country and to himself; and when he cannot mould the sentiment and measures of the nation, according to his own views, it is no departure from consistency, but on the other hand, a duty, whatever may be his own theory, to conform to that public opinion which he cannot lead. With this explanation of his sentiments, Mr. O. said, he wished the few remarks that he should offer to be understood. He did not stand forth as a champion for the sedition act, but as a sponser for the purity of the motives and a believer in the correctness of the constitutional doctrines of the party with whom he acted and voted on the passage of that law.

With respect to the constitutional question, it would hardly be endured, that he should, at this time of day, attempt to pursue it through all its windings and bearings. This would be no difficult, though a most unedifying task. The arguments, on both sides, were familiar to his recollection, for no question had ever undergone an investigation more elaborate and profound: But gentlemen seemed to think, that the arguments were all on one side. The reports of the Legislature of Virginia, of which the honorable gentleman was a member, and the speeches and writings of his friends, had absorbed the recollection of all other speeches and writings. But was there nothing on the other side entitled to attention? Were there no reports of Committees justifying the principles on which the act was established? Were there no speeches, no essays, no names and characters, in favor of this obnoxious law, worthy of remembrance or reply? These were indeed so numerous, as to leave it altogether doubtful whether the public feeling, which it is agreed exists in opposition to the system, arose from any

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conviction in a majority of the nation of the want of constitutional power in Congress to pass the act, or merely from an aversion to its provisions and a dread of its abuses. As it was not therefore necessary to his purpose, to examine in detail the constitutional question, he was content to declare that his mind had always reposed upon a single consideration, detached from all others, as sufficient to uphold the act. *All governments must possess an inherant right to punish all acts, which being morally wrong, tend directly to endanger their existence or safety.* This power would be implied in the constitution, even though no express words had conveyed the authority to make all laws "*necessary and proper*," to give effect to the instrument. Without such a right, no government is competent to the great duty of self protection. Whether the sedition act was then, in fact, indispensable to the safety and existence of the national government, is not the principal enquiry. But did those who framed it, in the sincerity of their hearts, believe it to be so? And having, at that time, reasonable grounds for such an apprehension, were they justifiable in passing the act? To judge conclusively and candidly on this subject, sir, you must be pleased to recur to the state of public affairs in those times. It was a period of great alarm and great danger: Defensive measures were the order of that day. You were, in fact, at war with France, whose revolutionary fires were lighted up in every part of Europe, threatening the destruction of all governments, whether free or despotic. You had organized an army, augmented your naval establishment, and authorised letters of marque: Your ambassadors had been spurned from the footstool of the directory: Tribute was demanded as the price of justice: All countries were filled with spies and agitators, employed by France to sow discontent and sedition, and separate governments and people, and to this end the press had been always a principal engine. Under these circumstances, the sedition act was adopted as one of a series of *measures of defence.*

It might be said, as it was said at that period, that the dangers were illusory, and the fears deceitful pretexts, for high-toned and arbitrary measures. But who approved of the system adopted by that administration, and held himself in readiness to execute its measures? The man, in memory of whose patriotic virtues, a bill on your table proposes to erect a monument. But he persuaded himself that the candor of gentlemen, in the temperature of their present feelings, would not permit them to place confidence in such arguments or suggestions. For if the terrors of French agency and *espoinage*, in that day, should be reprobated as artificial, in what higher estimation should be held the suspicions of British influence and intrigue, which, at a subsequent period, gathered over the heads of men, who were pledged to the love and defence of their country, by all the securities which result from services, character, property, family connexions, and indissoluble interests! There would, indeed, be no end to the catalogue of accusations

and recriminations—to the impeachment of views and motives, and the imputation of foreign predilections. They were never creditable to either party in the eye of the world, and the day has past in which it can be deemed useful to revive them, by men of enlarged and liberal minds. He would, however, desist from pursuing this view of the question further, than to remark that he had never surmounted the astonishment he had always felt, at perceiving how strongly was contrasted the abhorrence of gentlemen for the second section of the sedition act against libels, with their toleration of the first section of the same act, which had never been objected to. Yet under that section, sedicious advice, *in writing* or by word, without any overt act, was made an indictable offence. [Here Mr. O. read a section of the act.] To counsel, said he, an unlawful assembly, with intent to oppose the laws, was made a crime, *whether the purpose were executed or not.* Here, then, is a restraint upon the freedom of the press, agreeably to the construction of gentlemen, equally unsupported by the letter of the constitution, with that imposed in the subsequent clause. He had lately seen essays in that chamber, which need go but little further to fall within the description of offences, described in the first section in which the President of the United States is called a highway-man, with his hand in the public purse: and an usurper of power, in which Congress participate. For deliverance from this evil, it is said there is no resource, but in the exercise of the revolutionary spirit, and much other inflammatory matter. All this might now be despised and regarded as the idle wind. Yet there might be a time in which the public sentiment would revolt against the toleration of such writings, and call for the punishment of the authors; and though he did not believe the present moment required such an interference, he could not consent to declare, by an act of legislation, that the people by their representatives, had no right, on any occasion, to interpose. To leave the question of constitutionality, and to say nothing of the common law and laws of the several States, he objected to the amendment proposed, on the ground *that Congress has no constitutional power, to declare a law, framed by its predecessors, to be unconstitutional, in any other mode than by repealing it.* He called upon gentlemen, who insist upon a literal adherence to the phraseology of the constitution, to lay their finger on any clause comprising this power; they would search in vain: it is in its nature a judicial power. When a law has been executed by 'the adjudication of a court,' the judgment can be vacated only by a legal tribunal in the ordinary forms. No writ of error lies to Congress, especially when a law has expired and is *functus officio;* and no judgment can be reversed by the great inquest of the people, (to use the language of the honorable gentleman) even were it possible to take their verdict. The honorable gentleman is not a trustee of the people, (to use his word again) for any such purpose. No precedent is on record to support such a motion.

Should it succeed, it would be nugatory ; it would not contain any exposition of constitutional law that would be intelligible. Or if it did explicitly state the sedition act to be unconstitutional, it may be repealed at any time, and its doctrine exploded. There would be no end to this conflict of constitutional opinions and legislative pandects. But the tendency of this mode of legislation is sufficiently discouraging, if gentlemen look only to the consequences. It is not wonderful that we incline to bring all questions of this nature to the standard of our local prejudices and predominant impressions. In this process we overlook the prejudices and impressions of other persons, and the analogy of other cases.

But is the sedition act the solitary infraction of the Constitution, which has been charged upon Congress? He would hardly venture to adduce a parallel case, from the part of the country in which he resided, distrustful as he should be of the weight to be attached to it, if not supported by authority which gentlemen would respect. He could remind them, that in that section of the country, a very general opinion had prevailed adverse to the constitutional power of Congress to institute an embargo by a *perpetual statute*.

This opinion was entertained in the Eastern region of the country, by a class of proselytes, not less numerous, in all probability, than that which, in another part of the country, had regarded the sedition act as passed in contempt of the Constitution. To this construction, however erroneous, (and he, Mr. O. had never subscribed to it) a professional gentleman of high standing, (Mr. Dexter) and who soon after enjoyed the confidence of the republican party in Massachusetts, and was said also to have possessed that of the general government, had lent the sanction of his eminent name and talents. What guarantee can then be given, if this motion prevails, against claims for all the fines and penalties incurred and levied under this act? Who will ensure us that twenty years hence, some individual, graced with the endowments of intellect and eloquence which distinguish the gentleman from Virginia, will not avail himself of some predominent party in the legislature, to stigmatize that system of embargo, and reclaim the penalties for the innocent sufferers, and their heirs and assigns? He certainly should not think it a desperate case, if that honorable gentleman, (who, he hoped, might even then be in that Senate) or some other on whom the mantle of eloquence and influence might fall, should undertake to array in support of this doctrine, the feelings and prejudices of a party which might incline to adopt it. And, was this an extreme case? Was it an hypothesis more eccentric than the possibilities suggested by the honorable gentleman himself? Of bills of attainder, and palpable violation of the constitutional restrictions? But could no other instances be adduced of sincere and ardent controversies upon constitutional questions, in which the opinions of those who represent the Grand Inquest of the people, and (consequently it may be supposed of their

constituents) have undergone a total revolution? What shall we say of the Bank of the United States? Who has forgotten with what zeal and solemnity, the authority in Congress to erect that institution, was contested by those who assumed to speak the language of the great majority of the people.—Yet now a Bank was found to be, as he had always believed it to be, not only a constitutional establishment, but regarded by its former adversaries as essential to the arrangements of the Treasury, and to the support of public credit. Hereafter, however, the opinion of a majority in Congress might revolve once more, and the Bank again be denounced as an unconstitutional engine. Then under this precedent, all the penalties incurred for counterfeiting its bills should be remitted, and no legal process sustained for the recovery of its debts. It would be easy to multiply instances of these controverted powers of the Constitution. Upon the very prominent subject of roads and canals, the President and Congress were, at this hour, at variance. Suppose the resolution affirming the right to be in Congress had passed, and appropriations had been made and applied to the object, would it have become expedient twenty years hence, for any party in power to have declared the law unconstitutional, and to have doomed the roads and canals to decay and ruin, and to have justified those who should have been punished for breaking down the gates and dykes, by refunding their penalties? Sir, there is no foresight that can reach to the confusion consequent upon these doctrines. Nor is there occasion for recourse to such efforts at reformation. The honorable gentleman has supposed extreme cases, from which fair inferences can never be drawn. But for such cases, should they happen, he has pointed to the corrective, not merely in the public opinion but the popular force. Still, complete justice cannot be effected, it is said, by the mere process of public opinion, without retribution is made to the sufferer. But, a perfect distribution of rewards and punishments, according to our poor notions, is not awarded in this world, under the dispensations of heaven. It is not the attribute of any human system. Equal and exact justice cannot always be done to those who suffer in the cause of their country, and great principles must not be prostrated for minor and equivocal advantages, and in cases, of which the merit is a subject of dispute.

There was, however, (said Mr. O.) another foundation on which gentlemen were disposed to support the motion, which was equally unsubstantial. They assumed it as a palpable and indisputable fact, that "the fiat" of the public opinion had been pronounced upon the *constitutionality* of this law—that the power of the nation had been taken from the hands of its framers, and their downfall was to be ascribed to the public disapprobation and resentment, displayed peculiarly against *this measure*. He believed, however, it would baffle the ingenuity of any man to demonstrate that the revolution of parties in this country, was at-

tributable, solely, or principally, to the sedition act. There was no imaginable test or criterion, whereby to ascertain that the people had ever passed judgment against the *constitutionality* of that act. That the act had become unpopular, and a theme of great reprobation in many parts of the country, is undeniable; and for this reason, he had admitted, he would not disturb its ashes. It is admitted, also, that the public disfavour towards it has not diminished. But, that a majority of the people, at the time of its passing, considered the act as a violation of the constitution, or that they are now in that persuasion, or have ever examined the constitutional question and qualified themselves to decide upon it, could not be made manifest by any proof. The change of administration, and of parties in power, did not turn upon the *sedition act alone.* All the principal features of the old administration had been rendered obnoxious to the people. They were compelled to originate every thing, in the infancy of a new government. Their measures were, of necessity, experimental; and their experiments were made in difficult times and under great disadvantages. The people were led to consider them as superfluous, oppressive, and expensive. It was not merely the act in question, but the army, the navy, the taxes, the bank and the whole series of measures against which the public disaffection prevailed. But, sir, when their triumphant successors came into power, with all their solicitude for reform, they have found themselves, under similar circumstances, impelled to adopt many of the measures which they before, probably, with great sincerity condemned.—He did not make this intimation in any spirit of upbraiding or censure; on the contrary, he was willing to do justice to the magnanimity which would renounce prejudices for the sake of the public welfare, and be reconciled to measures when convinced by experience of their necessity, which might formerly have been obnoxious to their censure. Such was now the state of affairs. Those who were now in power, finding themselves responsible for the conduct of our national concerns, had consented, (and he said it with sincere approbation) to discharge that responsibility, by the means pointed out by their unfortunate predecessors—by the only practicable means. It would indeed, sir, be a curious and not unedifying experiment, if two disciples, one of the old school and the other of the new, should commune together, in a disposition to ascertain, not the points of animosity and collision, but the subjects of mutual assent, existing between them. If, sir, with this desire, and in an amicable frame, anxious to settle some practical principles, and to concur in measures adapted to promote the common interest of their country, they should review past transactions, what might be imagined to be the substance of their dialogue? You, says the republican, in your time, expecting a war with France which did not happen, organized a provisional army at an enormous expence—and you, says the respondant, after you became involved in war with Great Britain,

raised an army also, and must have wished you had commenced the project at an earlier date.—But you augmented the naval establishment and aimed to establish a navy, for which the country was not ready.—" Agreed that we did so, and we could have succeeded in convincing the nation of its utility, but you were not convinced, and opposed it with the zeal and talents of your greatest men, at length, however, you have extended your views of a naval establishment, beyond those at that time indulged by us; and have secured great glory and benefit to our country: I give you the homage of my thanks and will aid you in your support of it." " But you made a Bank."—" So did you."—" You imposed direct and internal taxes."—" You did the same."—" You increased the public debt and borrowed money at extortionate interest."—" You could not proceed without borrowing larger sums at higher interest."—" You passed an alien act, when not *formally* at war."—" But you executed the provisions of an alien act, the moment you were actually at war."—" You passed a sedition act " Admitted, but our motives were good, and, finding it obnoxious to the people, it was permitted to expire.

Sir, this comparison might be pursued further, and with advantage, so long as motives are not arraigned and conciliatory temper should preside. The further we proceed, the more evident it would appear, that those who are now in power had pursued, and had been compelled to pursue, the example of those who had preceded them, when called to act in similar emergencies; and that to every fair description of the old system, by its opponents, it would be fair to answer

" ——Mutato nomine de te
" Fabula narratur."

Enough, however, had been said, to bear him out in his assertion, that the public opinion did not distinguish the sedition act as the only unpardonable sin of the former administration, but involved it in a general and indiscriminate condemnation of all its principal measures. Most of those measures had surmounted the odium which attended their adoption: this still remained the object of unrelenting aversion, and he certainly was not anxious to see it brought into favour.

Mr. Otis persisted in disavowing every intention of reproach, or even of rebuke, and all emotions of envy or resentment; all disposition, in short, to do more than vindicate the patriotism and character of his absent friends, which he was most happy to find himself, by the candor of gentlemen, permitted to do without any occasion to complain of the course of debate. He felt no desire to impede the measures of any party or administration, merely because they had triumphed and his friends had fallen from power.—Let them be content with their power, and exercise it with a magnanimous regard to the common interests of the nation, (and hitherto he perceived no cause of complaint,) and while he

remained in that Senate an humble and insignificant member, he was ready to contribute his feeble aid, when wanted, to the promotion of any measure, or system, entitled to the approbation of his judgment and conscience, without reference to its source. He trusted, so far as he was informed, that this was the disposition of his ancient colleagues and friends, who were more happy to behold their country prosper, than ambitious of taking an active part in its affairs. Perhaps the time may arrive, in which the well disposed of both political parties, may be willing to revert to the consideration of the means by which one has lost, and the other acquired, the administration of affairs, and the animosities and invectives of which both have been prodigal, more with a view to a just estimation of their own faults and demerits, than those of their friends. Such a review would be salutary, at least in preparing all to display more of forbearance and moderation towards their adversaries on future occasions, when new subjects, or new names, shall, in whatever form, excite the struggle of new parties.

He concluded, by shortly recapitulating the arguments on which he rested his opposition to the motion—insisting that the sedition act was not unconstitutional—that Congress was not competent so to declare it—and that the people, however dissatisfied with it, had afforded no criterion, by which the public sentiment on that question, could be made certain.

THE EXAMINER IN REPLY.

The above speech was delivered by Mr. Otis, on the petition of Matthew Lyon, (a member of Congress) who was prosecuted under the Sedition law—who suffered imprisonment, and was subjected to a heavy fine.—The following remarks on this speech, were inserted in the "*Independent Chronicle and Patriot*," and as the doctrine advanced by Mr. Otis tends to the *annihilation* of the constitutional powers of the *Legislature*, and the establishment of the *exclusive rights of the Judiciary*, it is thought proper, that this important question should be maturely considered, by republishing the *speech* and the *reply* together. This mode must be acknowledged as the *fairest ground*, on which this controversy can be placed.—It is a subject highly interesting, and we recommend the *following examination* to the candid perusal of every impartial citizen."

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